HAKIKAT ENGINEERING SDN BHD

v.

KETUA SETIAUSAHA KEPADA KEMENTERIAN PENERANGAN, KOMUNIKASI DAN KEBUDAYAAN & ORS

HIGH COURT MALAYA, KUALA LUMPUR
YEOH WEE SIAM J
[CIVIL SUIT NO: 21 NCVC-250-11-2011]
9 MAY 2013

CONTRACT: *Building contract - Assignment - Main contract assigned from original main contractor to plaintiff to complete unfinished building works - Government agreed on request for price escalation terms - No contract signed between plaintiff and government - Government's refusal to pay for price escalation - Plaintiff's claim based on price escalation rejected by Jawatankuasa Pelaksanaan dan Semakan Kontrak - Whether plaintiff entitled to claim price increase of raw materials*

CONTRACT: *Privity of contract - Assignment - Main building contract assigned from original main contractor to plaintiff to complete unfinished building works - No contract signed between plaintiff and government - Whether there was privity of contract between plaintiff and government - Government Contracts Act 1949, s. 2*

The plaintiff was a building contractor. At all material times, Ibsul Holdings Sdn Bhd ('Ibsul') was appointed by the third defendant as the main contractor to carry out a contract known as 'the Kuantan Project'. The main contract for the Kuantan Project which was awarded to Ibsul also included the electrical and telecommunication and the fire fighting works. Due to the failure of Ibsul to carry out the main contract works in the Kuantan Project, the plaintiff was invited by the first and/or second defendants, to take over and complete the same. The plaintiff informed the first and second defendants that the plaintiff would only take over the balance of the unfinished sub-contract works provided that the second defendant paid for the increase in the price of equipment and materials. Both the first and second defendants represented and assured the plaintiff that the plaintiff would be paid for the same. By an assignment dated 9 May 2005, Ibsul, on the directions of the second and third defendants, assigned to the plaintiff, as the assignee, the monies due and payable to Ibsul under the main contract as payment for executing the balance of the works in the Kuantan Project. By a letter dated 12 July 2005, the plaintiff, *inter alia*, informed the first and second defendants that the written confirmation for the works had yet to be made and confirmed in writing by the second defendant in order

to ensure that the treasury will process their claims and the balance for the variation works which included the price escalation costs. The plaintiff carried out and completed the balance of work which it had taken over from Ibsul and was duly paid the sum of RM10,676,577.81 by the defendants. The plaintiff then submitted its claim for the price increase progressively for the sum of RM2,310,052.29. The second defendant informed the plaintiff that the Jawatankuasa Pelaksanaan dan Semakan Kontrak ('JKPDSK') had perused the plaintiff's application for payment and could not consider the same. Hence, the plaintiff now claimed against the defendants the sum of RM2,310,052.29 for the price increase of raw materials. The defence was that there was no privity of contract between the plaintiff and the defendants and therefore the defendants were not contractually bound to pay the plaintiff its claim for the price increase. The issues which arose for determination were: (i) whether there was any privity of contract between the plaintiff and the defendants; (ii) whether the defendants were contractually bound to pay the plaintiff his claim for the price increase; and (iii) the mechanism and basis for payment of the plaintiff's claim.

Held (dismissing plaintiff's claim):

(1) There was no written contract executed between the plaintiff and the defendants which fulfilled the requirements of s. 2 of the Government Contracts Act 1949. Hence, there was no privity of contract between the plaintiff and the defendants; *Royden (M) Sdn Bhd v. Syarikat Pembenaan Yeoh Tiong Lay Sdn Bhd* (refd). (paras 30 & 31)

(2) Despite the fact that there was no written contract executed between the plaintiff and defendants, the first and second defendants, in allowing the plaintiff to be the assignee of Ibsul, had also committed the defendants to make payment to the plaintiff, on an *ex gratia* basis, for any claims for price increase provided that such claims were made separately (from the balance of works to be completed under the main contract) to the JKPDSK. There was therefore a mechanism devised by the first and second defendants for the plaintiff's claim for price increase to be considered and paid. (paras 35 & 36)

(3) Since the defendants had devised the mechanism of the plaintiff's claim for price increase to be submitted as a separate claim to be considered by the JKPDSK and paid as an *ex gratia* payment, it was clear that according to the defendants' government procedure and treasury instructions, the JKPDSK had to decide accordingly. Thus, if receipts were required to support the plaintiff's claim, then such

receipts, should be furnished by the plaintiff for the JKPDSK's consideration. The plaintiff admitted that he did not have all the receipts, and therefore did not submit them to the JKPDSK. This meant that his full claim for price increase could not be allowed by the JKPDSK if the JKPDSK was not satisfied with the proof for such claim. The decision of the JKPDSK on whether to pay the plaintiff for the full sum for the price increase, or a lesser sum, on an *ex gratia* basis had to be upheld. (paras 47, 48 & 50)

Case(s) referred to:

Perunding Pakar Media Sdn Bhd v. Sen Media Sdn Bhd and Kerajaan Malaysia (First Third Party) and Majlis Sukan Malaysia (Second Third Party) in KL High Court Civil Suit No. D-22NCC-3-2011 (Unreported) ***(refd)***

Royden (M) Sdn Bhd v. Sykt Pembenaan Yeoh Tiong Lay Sdn Bhd [1991] 3 CLJ 2935; [1991] 3 CLJ (Rep) 670 HC ***(refd)***

Legislation referred to:

Government Contracts Act 1949, s. 2

For the plaintiff - DR John (Atma Singh Veriah with her); M/s Atma Singh Veriah & Co

For the 1st, 2nd & 3rd defendants - Cynthia Noor Hazean Sulaiman; FC

Reported by Amutha Suppayah

JUDGMENT

Yeoh Wee Siam J:

Background Facts

[1] The plaintiff carries on the business of, *inter alia*, building contractors.

[2] At all material times, Ibsul Holdings Sdn Bhd ("Ibsul") was appointed by the third defendant as the main contractor to carry out the contract works in Kuantan, known as "the Kuantan Project".

[3] The Kuantan Project commenced in 2002 and was to be completed by Ibsul in April 2004.

[4] The main contract for the Kuantan Project which was awarded to Ibsul also included the electrical and telecommunication and the fire fighting works ("the electrical and fire fighting works") for which the two nominated sub-contractors, ("NSCs"), were E & A Electric Sdn Bhd ("E & A") and Mixed Target Sdn Bhd ("MT") respectively.

[5] Subsequently, the NSCs, ie, E & A and MT, informed Ibsul of their intention to terminate their respective sub-contracts due to the default of Ibsul whose main contract works in the Kuantan Project had been substantially delayed and wholly suspended (CBOD 1 part 2 p. 25).

[6] Due to the failure of Ibsul to carry out the main contract works in the Kuantan Project, namely, structural, architectural and external works (which works had been suspended), the plaintiff was invited in January 2005 by the first and/or second defendants, to take over and complete the same. The first and/or second defendants wanted the plaintiff to carry out and complete the said unfinished sub-contract works as a new and rescue contractor.

[7] The plaintiff informed the first and second defendants that the plaintiff would only take over the balance of the unfinished sub-contract works provided that the second defendant pays for the increase in the price of equipment and materials. Both the first and second defendants represented and assured the plaintiff in May 2005 that the plaintiff would be paid for the same.

[8] The plaintiff took over the site from E & A in May 2005.

[9] By an assignment dated 9 May 2005, Ibsul, on the directions of the second and third defendants, assigned to the plaintiff, as the assignee, the moneys due and payable to Ibsul under the main contract as payment for executing the balance of the main contract works in the Kuantan Project (CBOD 1 part 1 pp. 1 to 7).

[10] By a special report, ie, the 'Lapuran Khas Cadangan Penyelesaian dan Penyiapan Kerja-Kerja NSC untuk Sistem "Electrical and Telecommunication" dan "Fire Fighting"', the minutes of the special meeting held on 1 June 2005 were confirmed and reference was made to cl. 29(b) of the sub-contract which permitted Ibsul, as the main contractor, to take over the works after the termination of the sub-contractors and for the appointment of the plaintiff to continue and complete the balance unfinished sub-contract electrical and fire fighting works (see D1 Laporan Khas Penyambungan Semula Kerja Sub-Kontraktor).

[11] By a letter dated 6 July 2005 addressed to the project architect and copied, *inter alia*, to the first and second defendants, the plaintiff referred to site meetings and proposed their price for the sub-contract electrical and fire fighting works taking into consideration, *inter alia*, the cost factor involved to meet the technical and commercial requirements for both scopes of work ie,:

(i) the actual balance of the scope of work; and

(ii) price escalation factor due to materials price increase.

[12] By a letter dated 12 July 2005, the plaintiff, *inter alia*, informed the first and second defendants that the written confirmation for the works has yet to be made and confirmed in writing by the second defendant in order to ensure that the treasury will process their claims and the balance for the variation works which included the price escalation costs so as not to jeopardize the completion of the balance unfinished sub-contract electrical and fire fighting unfinished works in line with the time schedule (CBOD 1 part 2 p. 102).

[13] By letter dated 14 July 2005 addressed to the project architect and copied, *inter alia*, to the first and second defendants, the plaintiff made reference to a site meeting and their earlier letters and submitted a detailed scope and bill of quantities ("BQ") for the sub-contract electrical and fire fighting works and informed them that as per the instructions given at the site meeting, the plaintiff was proceeding to procure all remaining materials/equipment involved for both the contracts (CBOD 1 part 2 pp. 107 and 109).

[14] The BQ included the price escalation due to material price increase in raw materials, particularly steel and copper, which were enclosed. There was no dispute or rejection by the first and second defendants by their servants and/or agents of the above at the material time.

[15] The first and second defendants, after the said representation and assurance that payment for the escalating costs will be made and agreeing to the plaintiff's terms for taking over the sub-contract works, decided to provide the mechanism for the taking over of the sub-contract works which would take the form of a deed of assignment.

[16] In compliance with the formality set out in cl. 29(b) of the sub-contract, this mechanism for the takeover was confirmed by the second defendant in their letter dated 27 July 2005 signed by the first defendant wherein Ibsul was informed that the second defendant had no objections regarding the proposal of Ibsul to accept the plaintiff by deed of assignment for the continuation and completion of the balance unfinished sub-contract electrical and fire fighting works upon the termination of the same on the following conditions, *inter alia*:

> 2. (b) Sebarang rayuan kenaikan harga di luar peruntukan kontrak hanya boleh dipertimbangkan di atas dasar **'*Ex gratia*' dan dikemukakan secara berasingan kepada jawatankuasa tuntutan** yang telah ditetapkan oleh Kementerian Penerangan Malaysia;
>
> ...

(f) Hakikat Engineering Sdn Bhd sebagai **sub-kontraktor yang baru** perlu menyediakan Wang Jaminan Perlaksanaan (Performance Bond) dan polisi insuran kerja (CBOD 1 Part 2 pages 125 to 127) (emphasis added).

[17] However, finally, no deed of assignment was executed.

[18] The plaintiff carried out and completed the balance of work which it had taken over from Ibsul and was duly paid the sum of RM10,676,577.81 by the defendants.

[19] The plaintiff submitted its claim to the defendants' consultant engineer, Perunding Hashim & NEH Sdn Bhd ("the consultant engineer"), for the price increase progressively for the sum of RM2,310,052.29 comprising:

(i) the electrical installation works in the sum of RM1,515,923.19; and

(ii) fire fighting installation works in the sum of RM794,129.10,

totalling RM2,310,052.29, which is in line with the consultant engineer's evaluation and recommendation.

[20] After repeated reminders by the plaintiff to the second defendant requesting for payment for the price increase, the second defendant by letter dated 5 December 2007 informed the plaintiff that the Jawatankuasa Pelaksanaan Dan Semakan Kontrak ("JKPDSK") had perused the plaintiff's application for payment and could not consider the same "kerana ia tiada dalam klausa kontrak atau diluar syarat-syarat kontrak yang membolehkan kelulusan diberikan".

[21] The plaintiff appealed against the said rejection.

[22] By a letter dated 2 August 2011, the first defendant wrote to the plaintiff on behalf of the second defendant informing them that the second defendant is in agreement with the decision made by the JKPDSK in its meeting held on 24 June 2011 and thereby rejected the plaintiff's appeal on the claim.

[23] The plaintiff is now claiming against the defendants *vide* its amended statement of claim the sum of RM2,310,052.29 for the price increase of raw materials etc used for carrying out the electrical and fire fighting works ("the plaintiff's claim for price increase").

Issues

[24] The issues are:

(i) Whether there is any privity of contract between the plaintiff and the defendants;

(ii) Whether the defendants are contractually bound to pay the plaintiff his claim for the price increase; and

(iii) the mechanism and basis for payment of the plaintiff's claim.

Court's Evaluation Of The Evidence And Findings

(i) Whether There Is Any Privity Of Contract Between The Plaintiff And The Defendants

[25] The defence is that there is no privity of contract between the plaintiff and the defendants and therefore the defendants are not contractually bound to pay the plaintiff for his claim for the price increase.

[26] From the evidence adduced by both parties, it is not disputed that there is no written contract executed between the plaintiff and the defendants when the plaintiff took over from Ibsul to complete the balance of works to be completed under the main contract entered into between Ibsul and the defendants. This means that in actual fact the plaintiff took over as a sub-contractor of Ibsul under the main contract to complete the works.

[27] In *Royden (M) Sdn Bhd v. Sykt Pembenaan Yeoh Tiong Lay Sdn Bhd* [1991] 3 CLJ 2935; [1991] 3 CLJ (Rep) 670; [1992] 1 MLJ 33 Lim Beng Choon J (as he then was) at p. 674 (CLJ); p. 39 (MLJ) stated:

> It must be borne in mind that the general rule under the common law is that there is no privity of contract between the employer and the sub-contractor.

[28] Section 2 of the Government Contracts Act 1949 ("Act 120") provides:

> **2. Contracts on behalf of the Government**
>
> All contracts made in Malaysia on behalf of the Government shall, if reduced to writing, be made in the name of the Government of Malaysia and may be signed by a Minister or by any public officer duly authorized in writing by a Minister, either specially in any particular case, or generally for all contracts below a certain value in his department or otherwise as may be specified in the authorization.

[29] The plaintiff is unable to discharge its burden of proof to prove that:

(a) there is a contract in writing;

(b) made in the name of the Government of Malaysia;

(c) signed by the Minister or any duly authorized officer;

(d) the date of commencement and date of completion of the contract; and

(e) the value of the contract.

[30] Therefore, the court finds that there is no written contract executed between the plaintiff and the defendants which fulfils the requirements of s. 2 of Act 120.

[31] Going by the principle stated in *Royden (supra)*, and the provisions of s. 2 of Act 120, I hold that there is no privity of contract between the plaintiff and the defendants.

[32] The plaintiff was actually taking a commercial risk when it decided to accept the invitation of the first and second defendants to take over the balance for the completion of work to be done in the main contract executed between Ibsul and the defendants.

[33] In *Perunding Pakar Media Sdn Bhd v. Sen Media Sdn Bhd and Kerajaan Malaysia (1st third party) and Majlis Sukan Malaysia (2nd Third Party)* in KL High Court Civil Suit No. D-22NCC-3-2011, Mohamad Arif Bin Md Yusof J (as he then was) stated:

> ... in the case of any government contract involving more than a million ringgit, there has to be a proper written contract, and further the media plans themselves were principally addressed to MSN, a different party ...
>
> On this aspect of the case, i.e. the liability of the Government of Malaysia and/or MSN to the defendant, upon a full evaluation of the evidence, the submissions and the law, I find that the defendant has failed to establish its case against the Government of Malaysia and/or MSN. The commercial risk of non-payment in the absence of a proper government contract and in the face of a questionable payment procedure, has to lie with the defendant.
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> The claim of the defendant in paragraph 5 of the Defendant's statement of claim against the third parties therefore stands dismissed with costs.

(ii) Whether The Defendants Are Contractually Bound To Pay The Plaintiff's Claim For The Price Increase; And

(iii) The Mechanism And Basis For Payment Of The Plaintiff's Claim

[34] Notwithstanding that there is no written contract executed between the plaintiff and defendants, the first and second defendants, by letter only, allowed the assignment of Ibsul's balance of work under the main contract to be given to the plaintiff (CBOD 1 Part 1 pp. 1 to 7). As the assignee, upon completion of the work, the moneys which were due and payable to Ibsul under the main contract, ie, RM10,676,577.81, were paid to the plaintiff. That payment is not an issue here since such works and payment were provided for in the main contract.

[35] Despite the fact that there is no written contract executed between the plaintiff and defendants, the first and second defendants, in allowing the plaintiff to be the assignee of Ibsul, had also committed the defendants to make payment to the plaintiff, on an *ex gratia* basis, for any claims for price increase provided that such claims are made separately (from the balance of works to be completed under the main contract) to the second defendant's committee ie, the JKPDSK (CBOD1 part 2 pp. 125 to 127).

[36] There is therefore a mechanism devised by the first and second defendants for the plaintiff's claim for price increase to be considered and paid.

[37] The JKPDSK rejected the plaintiff's claim for price increase on the ground that it was outside the terms of the main contract. It did not give any other reason for its decision to reject the plaintiff's claim or its subsequent decision in rejecting the plaintiffs appeal on the matter.

[38] The defendant's witnesses, in particular DW3 ie, the present Ketua Setiausaha ("KSU") of the second defendant, who was not the KSU at the material time, stated that the JKPDSK would have to consider the plaintiff's claim in accordance with the *Arahan Perbendaharaan* eg, para. 99 which requires all vouchers or claims to be accompanied by supporting documents such as bills, receipts, purchase orders etc before the treasury can approve such payment.

[39] Paragraph 99 of *Arahan Perbendaharaan* states:

> Baucar Hendaklah Disokong Dengan Dokumen Sokongan Yang Lengkap
>
> 99. (a) Semua baucar atau baucar elektronik hendaklah disokong dengan dokumen sokongan yang lengkap mengenai tiap-tiap satu perkhidmatan, bekalan atau kerja seperti tarikh, nombor, kuantiti, kiraan jauhnya dan kadar, untuk membolehkan ianya disemak tanpa merujuk kepada apa-apa dokumen selain daripada yang dikembarkan padanya. Apabila bayaran dibuat bagi sesuatu kontrak, baucar itu hendaklah mengandungi rujukan mengenai

A nombor kontrak itu. Dalam persekitaran elektronik, baucar elektronik beserta dokumen sokongan hendaklah disimpan dengan teratur dan selamat di jabatan penyedia.

[40] Even the plaintiff himself admitted that in his previous dealings with the Government in five other Government contracts, there were a B lot of procedures and requirements to be adhered to.

[41] PW2, Datuk Seri Dr Arshad bin Hashim, the former KSU of the second defendant ("the former KSU") and who was the KSU at the material time, confirmed the same. In fact, the former KSU was very C clear in his evidence that the plaintiff's claim for price increase of raw materials has to be considered by the JKPDSK accordingly, and it does not necessarily mean that every claim of the plaintiff would be approved.

[42] On the other hand, the plaintiff contended that the defendants had never informed him of the requirement by the JKPDSK for him to D submit receipts, bills, purchase orders, invoices etc (cumulatively to be referred to as "receipts etc") The JKPDSK only stated that it rejected the plaintiff's claim since it is outside the contract, and not because he did not furnish the receipts etc.

E **[43]** The plaintiff further contended that he submitted his claim for price increase based on the original costs plus a 20% nominal margin added with 5% for overhead expenses (CBOD 1 part 2 pp. 163 to 164).

[44] The plaintiff relied on the fact that even the defendants' own F consultant engineer, in its report on the price adjustments by the plaintiff (CBOD 1 part 2 pp. 165 to 170), stated that the plaintiff's claim for increase in costs was justified and recommended as follows:

(a)	Electrical Installation	RM1,515,923.19
G (b)	Fire Fighting Installation	RM794,129.10
	Total	RM2,310,052.29

[45] The consultant engineer's report and recommendation to the defendants was also supported by the defendants' project architect, ADC H Arkitek Sdn Bhd (see evidence of Arjan Singh (PW4) and Haji Alias Haji Maamur (PW3)).

[46] The KSU of the second defendant is the supervising officer ("SO") for the main contract. The former KSU (PW2) and the present I KSU (DW3) of the second defendant confirm that the SO has the final say regarding any contract. Therefore, even if the defendants' consultant

engineer recommends the plaintiff's claim for the price increase, it does not mean that the defendants have to pay according to such recommendation.

[47] In this case, since the defendants have devised the mechanism of the plaintiff's claim for price increase to be submitted as a separate claim to be considered by the JKPDSK and paid as an *ex gratia* payment, it is clear that according to the defendants' Government procedure and treasury instructions, the JKPDSK has to decide accordingly. Thus, if receipts etc are required to support the plaintiff's claim, then such receipts etc should be furnished by the plaintiff for the JKPDSK's consideration.

[48] The plaintiff has admitted that he did not have all the receipts etc and therefore did not submit them to the JKPDSK. This means that his full claim for price increase cannot be allowed by the JKPDSK if the JKPDSK is not satisfied as to the proof for such claim.

[49] It must be noted that *vide* the defendants' letter to the plaintiff dated 27 July 2005 (CBOD 1 part 2 pp. 125 to 127), it is not as of contractual right that the plaintiff should be paid for his claim for the price increase. Paragraph 2c at p. 126 clearly states that any appeal can only be considered on the basis of *ex gratia* and must be submitted separately to the claims Committee ie, the JKPDSK which had been established by the second defendant.

[50] This court is of the opinion that, notwithstanding the representations made by the first and second defendants to the plaintiff, there is no contractual obligation by the defendants to pay the plaintiff's claim for price increase. The decision of the JKPDSK on whether to pay the plaintiff for the full sum for the price increase, or a lesser sum, on an *ex gratia* basis has to be upheld. It must also be borne in mind that the plaintiff's action here is for a monetary sum. It is not an action for any declaratory relief eg, for an order to declare the decision of the JKPDSK as null and void, or for judicial review of the said decision. This case therefore has to be decided according to the reliefs applied for.

Decision

[51] Based on the above considerations, the court dismisses the plaintiff's claim. Costs are to be borne by the respective parties.

[52] This decision is without prejudice to whatever *ex gratia* sum that has been offered, prior to the trial, by the JKPDSK and/or the defendants as payment to the plaintiff for his claim for price increase.